Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

In re: Harry W. Weinstein,
Debtor.

PATRIOT PORTFOLIO, LLC,
Petitioner,

v.

HARRY W. WEINSTEIN,
Respondent,

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the First Circuit deviate from its obligations under Butner v. United States when it declined to accept the century old, unchallenged and unaltered pronouncements of the Supreme Judicial Court of Massachusetts which define the Respondent's interest in exempt property?

2. Did the Court of Appeals for the First Circuit commit error when it expanded the holding of Owen v. Owen to incorporate a preemption analysis of 11 U.S.C. §522(c) that resulted in unlegislated, substantive changes to the Massachusetts statute which defines the homestead exemption?

3. Did the Petitioner's judicial lien impair an exemption to which the Respondent was entitled and was it proper for the Bankruptcy Court to avoid that lien under 11 U.S.C. §522(f)?

4. Does the avoidance of judicial liens under 11 U.S.C. §522(f) violate the Takings Clause of the Fifth Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDING

Petitioner

PATRIOT PORTFOLIO, LLC[1]

Respondent

HARRY W. WEINSTEIN

Intervenor

THE UNITED STATES OF AMERICA

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[1]PATRIOT Portfolio, LLC has no parent or subsidiary company. Its members are Union Capital Limited Partnership and Bask Recovery Associates Limited Partnership. See Sup.Ct.R. 29(6).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 164 F.3d 677 (1999). A copy of this opinion is included in the Appendix at pages 1a-27a. The opinion of the United States District Court for the District of Massachusetts is reported at 217 F. Supp. 5 (1998). A copy of this opinion is included in the Appendix at pages 28a-35a.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its opinion and entered judgment on January 7, 1999. This Petition for Writ of Certiorari is filed within 90 days of the entry of judgment. The Court has jurisdiction to grant this petition for writ of certiorari in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U.S.C. §522 (c) (West Supp. 1998)

Reprinted in full at Appendix p. 58a.

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STATEMENT OF THE CASE

1. Background

Since September 1, 1966, the Respondent, Harry W. Weinstein (the "Debtor"), owned and occupied as his primary residence the real estate located at 45 Highland Avenue, Winthrop, Massachusetts (the "Residence"). On April 16, 1992, the Waltham District Court entered judgment for Guaranty First Trust Company (the "Bank") and against the Debtor in the amount of $60,125.47 (the "Judgment"). See **Appendix**, page 46a (hereinafter, "**App.** at ___"). Execution issued in the amount of the Judgment and the Bank caused the Execution to be levied against the Debtor's interest in the Residence on August 4, 1992, thereby perfecting its judicial lien. See id. Almost four years later, on April 2, 1996, the Debtor recorded a Declaration of Homestead relating to the Residence. Id. As a result of the Bank's failure and an assignment from the Federal Deposit Insurance Corporation, the Petitioner, PATRIOT Portfolio, LLC (hereinafter "Patriot"), is the assignee of the Bank's rights under its Judgment and Execution. See id. at 47a.

On August 26, 1996, the Debtor filed a voluntary petition with the United States Bankruptcy Court for the Eastern Division of Massachusetts (the "Bankruptcy Court"), Case No. 96-16431-WCH. Id. at 46a. In his bankruptcy schedules, the Debtor claimed an exemption in the amount of $55,000.00 relating to his Residence and referencing Mass. Gen. L. c. 188, §1, the Massachusetts statute which creates the homestead exemption. On October 23, 1996, Patriot filed with the Bankruptcy Court an *Objection to the Exemptions Claimed by the Debtor as to His Residence* (the "*Objection*"). Id. at 45a. In the *Objection*, Patriot argued that the statutory limitations inherent in Mass. Gen. L. c. 188, §1 prevented

any exemption to which the Debtor may have been entitled under that statute from having a detrimental impact upon Patriot's judicial lien. Id. at 47a. In essence, Patriot relied upon the statutory provisions adopted by the Massachusetts legislature which specifically stated that the exemption accorded by Mass. Gen. L. c. 188, §1 would be ineffective against obligations incurred by the Debtor prior to recording a declaration of homestead. See id. On October 26, 1996, the Debtor filed his *Response to Patriot Portfolio, LLC's Objection* (the "*Response*") and added a request that the Bankruptcy Court avoid Patriot's judicial lien pursuant to 11 U.S.C. §522(f) (hereinafter, "522(f)"). Id. at 45a. On January 29, 1997, the Bankruptcy Court allowed Patriot's *Objection* and denied the relief requested by the Debtor in the *Response* stating,*inter alia*, that "There are no grounds upon which Patriot's lien is avoidable." See id. at 47a-55a.

The Bankruptcy Court reversed itself, *sua sponte*, on March 25, 1997 and adopted the analysis of In re Whalen-Griffin, 206 B.R. 277 (Bankr. D. Mass. 1997), which held that 11 U.S.C. §522(c) (hereinafter, "522(c)") preempted the so-called exception to the Homestead Statute relating to pre-homestead declaration debts. See **App**. at 42a-44a. Patriot appealed. After remanding the matter for Bankruptcy Court clarification on the relationship between section 5 of the Homestead Statute and §522(c), the United States District Court for the District of Massachusetts ("District Court") affirmed the Bankruptcy Court. See id. at 28a-32a. On appeal, the United States Court of Appeals for the First Circuit (the "First Circuit") affirmed the lower courts' decisions and further held that §522(f) did not cause an unconstitutional taking of private property. See id. at 13a-18a, 20a-24a.

2. Jurisdictional Statement

The Bankruptcy Court had jurisdiction over Patriot's *Objection* pursuant to 28 U.S.C. 157(b)(2)(B) and consistent with 11 U.S.C. §522(l) and Fed.R.Bankr.P. 4003. The Bankruptcy Court entered a final order on Patriot's *Objection* on March 25, 1997. See **App**. at 42a-44a.

Patriot filed its Notice of Appeal on April 3, 1997. See **App**. at 28a. Patriot filed a *Notice of Election* dated April 3, 1997, in compliance with 28 U.S.C. §158(c)(1)(A), thus causing the District Court to have jurisdiction over the appeal, rather than the Bankruptcy Appellate Panel for the First Circuit. See **App**. at 28a. On February 12, 1998, the District Court denied the relief requested by Patriot in its appeal. See id. at 28a-35a.

The District Court's denial was a final decision in accordance with the provisions of 28 U.S.C. §158(d). See id. at 28a-35a. Patriot filed its Notice of Appeal of the District Court's decision on March 13, 1998. The First Circuit had subject matter jurisdiction over Patriot's appeal pursuant to 28 U.S.C. §158. On January 7, 1999, the First Circuit affirmed the Bankruptcy Court's decision and denied the relief requested by Patriot in its appeal. See id. at 1a-2a.

REASONS FOR GRANTING THE WRIT

The First Circuit improperly expanded the holding contained in Owen v. Owen and failed to adhere to the directives of Butner v. United States and Farrey v. Sanderfoot by legislating changes in property interests and exemption schemes previously left untouched by the United States Congress. Instead of analyzing the property rights of Patriot and the Debtor under Massachusetts law, the First Circuit invoked the doctrine of preemption to strip Massachusetts's homestead exemption scheme of its character so that it would conform more closely to the exemption of a debtor's residence provided by the bankruptcy code exemption scheme. Where the United States Congress explicitly granted the states the ability to create their own exemptions and refrained from redefining state law property interests, it rejected the goal of uniformity which the First Circuit erroneously adopted.

The First Circuit is one of few courts to explore the relationship between §522(c) and state-created exemption schemes. Where it has invoked this provision to strike down a state's definition of its own exemptions, guidance is warranted from the Supreme Court. The First Circuit's application of §522(c) in this manner, as well as the lingering question about whether §522(f) violates the Takings Clause of the Fifth Amendment to the Constitution of the United States, merit the attention of the Supreme Court and the issuance of a writ of certiorari.

I. THE FIRST CIRCUIT ERRONEOUSLY INTERPRETED OWEN V. OWEN AND ENTERED A DECISION WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT IN THE CASES OF BUTNER V. UNITED STATES AND FARREY V. SANDERFOOT.

In Butner v. United States, 440 U.S. 48 (1979) (hereinafter, "Butner"), this Court directed the federal courts to look to state law to determine the extent and scope of property rights prior to applying the provisions of the Bankruptcy Code. In reviewing Patriot's appeal, the First Circuit failed to define the Debtor's property interests in accordance with Massachusetts statutory and common law, thereby violating the tenets of Butner.

Compounding the First Circuit's erroneous analysis is the fact that a proper interpretation of Massachusetts property law would have eliminated the perceived conflict between the Massachusetts law and §522(c) as they could have been read consistently, thereby obviating the need to apply the principles of preemption. No decision from this Court endorsed either direct interference with the states' rights to define property interests or preemption of state law exemption schemes through the application of §522(c). Instead, the Owen v. Owen decision, coupled with Farrey v. Sanderfoot, actually reinforced a state's role in evaluating the competing claims of debtors and creditors in a particular asset. In expanding the holding in Owen v. Owen beyond its intended effect, the First Circuit relied heavily on the Bankruptcy Court's preemption analysis and ignored the directives of Butner and Farrey. See In re Whalen-Griffin, 206 B.R. 277 (Bankr. D. Mass. 1997). The First Circuit's failures in this regard warrant the granting of Patriot's petition.

A. *Contrary to the holding in Butner v. United States, the First Circuit failed to recognize the true nature of the property interests created by the Massachusetts homestead exemption scheme.*

"Property interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979); see also Taylor v. Voss, 271 U.S. 176, 190-91 (1926); Stellwagen v. Clum, 245 U.S. 605, 613-17 (1918). While the United States Congress has the authority to preempt state common law and statutory property interests, it has not done so and "has generally left the determination of property rights in the assets of a bankrupt's estate to state law." Butner, 440 U.S. at 54. A court must defer to the state's definition of property rights unless there is an actual conflict between an act of Congress and state property law. See Butner, 440 U.S. at 54-55; Taylor v. Voss, 271 U.S. at 190; Stellwagen v. Clum, 245 U.S. at 613.[2]

In Butner, this Court reiterated the policy that bankruptcy law "'recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like.'" See Butner, 440 U.S. at 54, n. 9, quoting Stellwagen v. Clum, 245 U.S. at 613. Relying on this policy, the Court resolved a conflict among the Courts of Appeal in favor of a state-based analysis for evaluating the competing claims of mortgage holders and

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[2]See Davis v. Davis (In re Davis), 1999 U.S.App. Lexis 4251 at *3 (5th Cir. March 17, 1999) (Where Congress has allowed states to select exemption schemes to the exclusion of the federal exemption scheme, §522(c) was not intended, either expressly or impliedly, to preempt state laws).

trustees in bankruptcy. See Butner, 440 U.S. at 51-57. In doing so, this Court explicitly recognized that its ruling could engender a lack of uniformity of results in various states. Id. The Butner endorsed the decision the analysis adopted by the majority of the Courts of Appeal which had held that the law of the state where the mortgaged property was located would control the outcome of the dispute. See id. at 52-53. In doing so, this Court rejected the holdings of two Courts of Appeal which held that a federal rule of equity should be adopted to adjudicate this type of dispute. See id. at 53-54.

Massachusetts provides homeowners with the ability to preserve their primary residence with an exemption scheme that has remained fundamentally unchanged for more than 100 years. See Mass. Gen. L. ch. 188, § 1, et seq. (1998) (hereinafter, the "Homestead Statute"). Eseential to this scheme, however, is a statutorily defined asset known as the homestead estate (hereinafter, the "Homestead Estate"). See id. § 1. In reviewing the competing claims of Patriot and the Debtor, the First Circuit ignored Massachusetts property law, refused to acknowledge the existence of the Homestead Estate in the manner defined by the Homestead Statute and Massachusetts courts and, consequently, failed to adhere to the directives from Butner. With specific reference to the Homestead Estate created by the Homestead Statute, the First Circuit stated erroneously that "We view this characteristic as a distinction without a difference, which does not warrant different treatment under the Code. Moreover, we note that the 19th century cases Patriot relies on for support neither address nor control bankruptcy issues."[3] **App.** at 12a-13a.

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[3]While the First Circuit disregarded the "19th century cases," the holdings of those cases have not been overturned or otherwise modified since they were decided by the

Federal courts acting in a bankruptcy context have consistently deferred to a state's common law and statutory definitions when reviewing property interests similar in nature to the Homestead Estate, including a spouse's right to dower and the division of marital property. See Taylor v. Voss, 271 U.S. at 187-91 (analyzing the intricacies of Indiana's laws relating to marital property); McCafferty v. McCafferty (In re McCafferty) 96 F.3d 192, 197 (6th Cir. 1996) (deferring to the laws of Ohio regarding formation of constructive trusts); Taliaferro v. Alexander, 80 F.2d 172, 173-74 (4th Cir. 1935)(evaluating claims of competing creditors by invoking the right of dower as defined under the common law of North Carolina); Thomas v. Woods, 173 F. 585, 590-94 (8th Cir. 1909), vacated by dismissal, 178 F. 1005 (1910) (deferring to Missouri's common law right of dower); Hesseltine v. Prince, 95 F. 802 (D. Mass. 1899)(recognizing that "the rights of the husband in the property of his wife are limited by the statutes of Massachusetts, and this court is governed by the interpretation put upon those statutes by the supreme court of the commonwealth").

An example of this deference is found in the decision of Thomas v. Woods which contains a cogent analysis of Missouri's right of dower prior to applying bankruptcy principles to it. 173 F. at 591-92. In Thomas v. Woods the Court of Appeals for the Eighth Circuit rejected the notion that a wife's dower rights were in the nature of exemptions and reaffirmed their status as property interests. See id. Specifically, the Court of Appeals held that "The right of

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Supreme Judicial Court. See Section I(B), *infra*. Moreover, the dearth of more recent opinions interpreting the Homestead Statute evidences the continued efficacy of the "19th century cases."

dower in real property is determined by the laws of the state in which the property is situated." Id. at 593.

When the First Circuit refused to address the property interests created by the Homestead Statute, it deviated from the well established practices emphasized in Butler. The First Circuit's rejection of these principles warrants review by this Court. If the First Circuit had engaged in the appropriate analysis of Massachusetts property rights, Patriot would have been allowed to retain its judicial lien.

B. The Homestead Statute creates an interest in property, not merely an exemption.

The Homestead Statute entitles a qualifying homeowner to create a Homestead Estate which is beyond the reach of his or her creditors. Mass. Gen. L. ch. 188, § 1 (1998). The first sentence of the Homestead Statute states that:

> ***An estate of homestead*** to the extent of one hundred thousand dollars in the land and buildings ***may be acquired*** pursuant to this chapter by an owner or owners of a home or one or all who rightfully possess the premise by lease or otherwise and who occupy or intend to occupy said home as a principal residence.

Id. (emphasis added). The phrase "may be acquired" reveals that the Homestead Estate contemplated by the Homestead Statute is an interest in property which is separate and apart from the real estate itself. See Pratt v. Pratt, 161 Mass. 276, 278 (1894); Weller v. Weller, 131 Mass. 446, 447 (1881); Cowdrey v Cowdrey, 131 Mass. 186, 187 (1881); Swan v. Stephens, 99 Mass. 7, 8 (1868); Silloway v. Brown, 94 Mass. (12 Allen) 30, 34 (1866); See also **Jordan B. Cherrick**, The

Homestead Act: An Important Law to Protect the Family But a Law in Need of Reform, **MASS.L.REV**. 175, 177 (July - October 1980).

The Massachusetts Supreme Judicial Court has consistently recognized that the Homestead Estate is a distinct interest in real property which may be claimed by a declarant's spouse or dependents. See Silloway v. Brown, 94 Mass. (12 Allen) at 32 (The homestead estate "is thus held by a distinct title from that which [an owner] holds any surplus or reversion of the same land"); see also Howard v. Wilbur, 87 Mass. (5 Allen) 219, 220 (1862); Mass. Gen. L. ch. 188, § 4 (1998). In this respect, the Homestead Estate is similar to the common law right of dower. See, e.g., Pratt v. Pratt, 161 Mass. at 277-78; Weller v. Weller, 13 Mass. at 447-49; Cowdrey v. Cowdrey, 131 Mass. at 187-89.

As a statutory creature, the Homestead Estate exists solely within the perimeter established by the legislature. See Kerley v. Kerley, 95 Mass. (13 Allen) 286, 287 (1866); **Arthur L. Eno, Jr., William V. Hovey**, 28 **MASS.PRAC.SERIES** §6.8, p. 154 (West Pub. Co. 1995) ("homestead was a purely statutory freehold estate"). In this regard, the first sentence of the Homestead Statute places a ceiling on the value of the Homestead Estate. Mass. Gen. L. ch. 188, §1 (1998). Regardless of the value of a person's residence or the equity available in that property, the Homestead Estate may not exceed $100,000.00. Id. The Homestead Estate also specifically does not affect the property interests aquired by any "mortgage, lien or other encumbrance" recorded against the property prior to the creation of the Homestead Estate. Mass. Gen. L. ch. 188, § 5 (1998).

The Homestead Statute further limits the value of the Homestead Estate with the following language:

> Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies **except** in the following cases:
>
> > (1) sale for taxes;
> > (2) for a debt contracted prior to the acquisition of said estate of homestead;
> > (3) for a debt contracted for the purchase of said home;
> > (4) upon an execution issued from the probate court to enforce its judgment that a spouse pay a certain amount weekly or otherwise for the support of a spouse or minor children;
> > (5) where buildings on land not owned by the owner of a homestead estate are attached, levied upon or sold for the ground rent of the lot whereon they stand;
> > (6) upon an execution issued from a court of competent jurisdiction to enforce its judgment based upon fraud, mistake, duress, undue influence or lack of capacity.

Mass. Gen. L. ch. 188, § 1 (1998) (emphasis added).

The statutory limitations placed on the Homestead Estate, the dynamics of the real estate market, and a homeowner's ability to reduce or increase the balance due under the mortgages and other liens on the premises result in the Homestead Estate being an asset which continuously fluctuates in value. See Silloway v. Brown, 94 Mass. (12 Allen) at 36 ("The homestead estate differs from ordinary

estates held in common, in not being an aliquot part of the land, but measured by value only, which may be constantly fluctuating"); Richards v. Chace, 68 Mass. (2 Gray) 383, 385 (1854) ("the actual value [of the Homestead Estate] may be constantly fluctuating by the alteration in the exchangeable value, and also in the condition of the estate"). Regardless of the Homestead Estate's constantly changing value, its creation causes two distinct property interests to be established: (1) an owner's interest in the real estate itself; and (2) his or her interest, as well as his or her dependents' interest, in the Homestead Estate.

Had the First Circuit viewed the Homestead Statute in this light, it would not have avoided Patriot's lien. Instead, it would have acknowledged that Patriot's Judgment limited the value of the Debtor's Homestead Estate because it predated the Debtor's Declaration of Homestead.

C. Owen v. Owen does not authorize preemption of state law exemption schemes.

Despite explicitly stating that it relied on Owen v. Owen to reach its decision regarding preemption, the First Circuit's reasoning and conclusion are inconsistent with Owen v. Owen.[4] See **App**. at 12a; Owen v. Owen, 500 U.S. 305 (1991). In Owen v. Owen, this Court makes no mention of preemption and mentions §522(c) only in passing. 500 U.S.

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[4]In Whalen-Griffin, the Bankruptcy Court also relied heavily on Owen v. Owen, and the First Circuit adopted much of its analysis from the lower court. See In re Whalen-Griffin, 206 B.R. at 285-92; **App**. at 16a-18a; cf. In re Fracasso, 210 B.R. 221, 224-29 (Bankr. D. Mass. 1997), rev'd, 222 B.R. 400 (Bankr. 1st Cir. 1998) (rejecting preemption analysis and upholding the Homestead Statute and all of its defining limitations).

at 308. The sole issue of law resolved by this Court in Owen v. Owen was that §522(f) would be applied to state exemptions in the same manner that federal courts had been applying it to federal exemptions. See id. at 310-13. This Court explained that in determining whether a lien impairs a federal exemption, bankruptcy courts "ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he *would have been* entitled but for the lien itself." See id., at 310-11. After accepting this thesis, the Court rephrased the test to read, "ask first whether avoiding the lien would entitle the debtor to an exemption, and if it would, then avoid and recover lien." Id., at 312-13. There is no question that this test turns on the existence and amount of a judicial lien, rather than the underlying debt itself.

In applying this calculus to Patriot's lien, the First Circuit should have concluded that lien avoidance under §522(f) was not warranted. Removing Patriot's judicial lien would not increase the exemption available to the Debtor because the definition of the Homestead Estate excludes claims based on obligations incurred prior to the recording of the Declaration of Homestead. See Mass. Gen. L. ch. 188, §1(2) (1998). Patriot's lien secures the Judgment, a claim against the Debtor which undisputably predates the declaration of homestead by over three years. See **App**. at 46a. When the Debtor's Homestead Estate was created, therefore, it was (and continues to be) limited by the amount of the Judgment. See Mass.Gen.L. c. 188, §1(2). This limitation was not altered in any way by Patriot's recording its judicial lien against the Residence.

The First Circuit erroneously interpreted Owen v. Owen to require the preemption of state law exemption schemes to the extent that they did not adhere to the

provisions of §522(c). See **App**. at 6a-13a. By directly comparing the categories of debts which §522(c) allows to be satisfied from exempt property with the so-called exceptions to the Homestead Statute, the First Circuit found that the exceptions were too broad. See id., at 13a-18a. Specifically, because §522(c) contained no exception for pre-existing debts, the First Circuit found that this limitation conflicted with §522(c) and would be eliminated through preemption.[5] Id. at 15a. In doing so, the Court of Appeals ignored the absence of any express or implied intention by Congress to preempt state law exemptions. See Davis v. Davis (In re Davis), 1999 U.S.App. Lexis 4251 at *18-23 (5th Cir. March 17, 1999).[6]

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[5]The First Circuit's holding would also require the preemption of Section 1, paragraph 3 of the Homestead Statute which precludes the Homestead Estate from having any effect upon "a debt contracted for the purchase of said home." Mass. Gen. L. ch. 188, § 1(3) (1998). This result would wreak havoc with the clear intent of the Massachusetts legislature to protect a home builder's right to be paid for his work, rather than be victimized it. An injustice would result if a builder went unpaid by a debtor who retained, through an exemption, the fruits of the builder's labor. See id.

[6]Unlike Massachusetts' Homestead Statute and §522(c), the Texas exemption scheme analyzed in Davis v. Davis appears to allow for no exceptions, limiting factors, or categories of debt which would warrant the liquidation of a debtor's homestead. See Tex.Const.Ann. art. XVI, §50 (1993). In holding that Texas law was not preempted and thereby resisting the temptation to impose on Texas law the limitations on exemptions contained in §522(c) and §523(a)(5), the Fifth Circuit conducted a thorough analysis of the factors militating against preemption. See Davis v. Davis (In re Davis), 1999 U.S.App. Lexis 4251 at *18-24. These factors included both the absence of any explicit expression of preemption and Congress's allowing the states to devise their own exemption

Where the full bench of the Fifth Circuit refused a creditor's invitation to amend the Texas homestead scheme by incorporating exceptions from §522(c) under a preemption analysis, the First Circuit stretched to find a conflict between those exceptions and the limitations on the Homestead Estate proscribed by the Massachusetts Homestead Statute. See id.; App. at 15a-18a.

While this Court held that liens which impaired exemptions were subject to avoidance, Owen v. Owen did not authorize the wholesale evisceration of state law exemption statutes. Instead, this Court instructed the Court of Appeals for the Eleventh Circuit to evaluate the creditor's lien in connection with Florida's exemption statute to determine whether the lien "fixed" on the exempt property. See Owen v. Owen, 500 U.S. at 314. The Eleventh Circuit was directed to implement lien avoidance under §522(f) only if the lien had, in fact, "fixed" upon exempt property. See id. When it engaged in this analysis, the Eleventh Circuit concluded that because the lien attached at the same instant that the debtor acquired an interest in the property, no fixing had occurred. See Owen v. Owen, 961 F.2d 170, 172 (11th Cir. 1992), cert. denied, 506 U.S. 1022 (1992). Consequently, the creditor's lien was not avoided. Id.

Had the First Circuit or the lower courts followed the directives of Owen v. Owen, rather than attempting to establish a uniformity that Congress determined should not

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schemes to the exclusion of, if they so desired, the exemption scheme developed by Congress. Id. In the end, the Fifth Circuit found no conflict warranting preemption as §522(c) "leaves the parties to their state law collection rights." Id. at *21-22.

exist, they would have reached a very different result.[7] Assessing the competing interests of Patriot and the Debtor under the Homestead Statute and then determining whether any "fixing" occurred under §522(f) would have resulted in Patriot retaining its lien and the absence of an over broad holding regarding preemption.

D. The First Circuit's decision is inconsistent with Farrey v. Sanderfoot because Patriot's lien did not "fix" upon the Debtor's Homestead Estate and cannot be avoided under 11 U.S.C. §522(f).

The First Circuit's analysis relies on the incorrect assumption that the Debtor's Residence, rather than the Homestead Estate, is the "property exempted" as defined by §522(c). See Swan v. Stephens, 99 Mass. 7, 10 (1868); Kerley v. Kerley, 95 Mass. (13 Allen) at 287. Patriot's lien is fixed only against the Residence; the lien is not fixed against the Homestead Estate. See Owen v. Owen, 961 F.2d at 172. Since the Homestead Estate exists apart from the Patriot's lien against the Residence, it is in no danger of being liquidated to satisfy a prepetition debt. Consequently, the Homestead Estate is the "property exempted" under §522(c). While the Debtor's interest in the Residence may be subject

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[7]Ironically, the Bankruptcy Court in Whalen-Griffin recognized that Congress, through the recommendation of the Commission on the Bankruptcy Laws of the United States, had the opportunity to adopt a uniform set of exemptions and preclude the states from enacting their own exemption schemes. See In re Whalen-Griffin, 206 B.R. at 289-90, n. 9. Where the Bankruptcy Court also acknowledged that Congress rejected this recommendation, its pursuit of uniformity through preemption is unwarranted. See id.

to liquidation in order to satisfy Patriot's lien, the Debtor's Homestead Estate will never be liquidated to satisfy Patriot's lien. When viewed in this light, there is no conflict between §522(c) and the Homestead Statute, thereby eliminating the need for a preemption analysis. See Equal Opportunity Comm'n v. Commonwealth of Massachusetts, 987 F.2d 64, 70 (1st Cir. 1993) citing Cippollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Greenwood Trust Co. v. Commonwealth of Massachusetts, 971 F.2d 818, 822-23 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993).

For a debtor to avoid a judicial lien impairing an exemption, the "property interest to which the lien attached" must have existed before the lien was fixed. Farrey v. Sanderfoot, 500 U.S. 291, 296 (1991); Owen v. Owen, 961 F.2d at 172. In this regard, this Court has held "that §522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest." Farrey v. Sanderfoot, 500 U.S. at 301.

Because the Debtor's Homestead Estate did not exist until after Patriot's lien was "fixed" on the Residence, and now exists as a property interest which is totally separate and distinct from the Residence, the Debtor cannot avoid Patriot's under §522(f). See id. There is no dispute that the Debtor owns the Residence and has acquired a Homestead Estate. In contrast to the federal exemptions delineated under both §522(d) and many other states' homestead laws, however, the exemption accorded by the Massachusetts Homestead Statute does not arise merely as a result of property ownership. Rather, the Massachusetts homestead exemption is available only to those parties who have acquired a Homestead Estate by recording a written declaration. See Mass. Gen. L. ch. 188, §2 (1998).

Patriot's lien was recorded on August 4, 1992. See App. at 46a. The Debtor did not record a Declaration of Homestead until April 2, 1996 and, consequently, the Debtor did not create his Homestead Estate until April 2, 1996. Id. Patriot's lien existed before the Debtor created the Homestead Estate and, therefore, it could not have "fixed" upon the Homestead Estate. At the time Patriot's lien was fixed upon the Residence, no Homestead Estate existed and, accordingly, it did not fix upon any exempt property. See Owen v. Owen, 961 F.2d at 172 ("because the lien was in existence prior to the property becoming homestead exempt, to permit the debtor's avoidance of this judicial lien would give the debtor a greater interest in the property than he had prior to the filing of the bankruptcy petition"). Under Farrey, therefore, Patriot's lien should not have been avoided. See Farrey, 500 U.S. at 299-301.

II. WHETHER PROSPECTIVE APPLICATION OF THE LIEN AVOIDANCE POWERS GRANTED TO A DEBTOR UNDER 11 U.S.C. §522(F) RESULTS IN AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT JUST COMPENSATION IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

A. The decision in United States v. Security Indus. Bank did not resolve the constitutional question.

This Court has long recognized that the "bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935), reh'g

denied, 296 U.S. 661 (1936) (hereinafter, "Radford"); see **U.S.CONST.** Amend V. As a result, the provisions of the Bankruptcy Code are vulnerable to Takings Clause challenges. See Radford, 295 U.S. at 589-602; United States v. Security Indus. Bank, 459 U.S. 70, 74-75 (1982) (hereinafter, "Security"). No exception exists which would exempt from this scrutiny the provision empowering a debtor to avoid a lien which impairs an exemption to which he or she is entitled. See Security, 459 U.S. at 75.

The Court has opined that the retroactive application of §522(f) to liens which existed prior to its enactment could have been violative of the Takings Clause if Congress had intended such an application. See Security, 459 U.S. at 103. Because the Court found that Congress had not intended §522(f) to be applied retroactively, however, it held that pre-existing liens could not be avoided by debtors. Id. at 71-81. This finding allowed the Court to restrict a debtor's lien avoidance power without addressing the Takings Clause question addressed by the Eleventh Circuit. Id. at 74 ("We do not decide the constitutional question reached by the Court of Appeals").

With respect to §522(f), however, there is no doubt that Congress intended *prospectively* to allow a debtor to avoid a judicial lien. See 11 U.S.C.A. §522(f)(1) (West. Supp. 1998). Whether a debtor's lien avoidance power under §522(f) results in an unconstitutional taking, therefore, remains an open question. Id. In analyzing Patriot's appeal,

the First Circuit explicitly recognized this fact.[8] See **App.** at 22a.

In evaluating Patriot's claim under the Fifth Amendment, the First Circuit again went to great lengths to use federal law to alter the property rights established under the law of Massachusetts. Through a tortured analysis examining Patriot's expectations at the time its judicial lien was recorded, the First Circuit concluded that the very nature of Patriot's property interest was circumscribed by §522(f). In doing so, the First Circuit was able to avoid, inappropriately, the question of whether Patriot was victimized by an unconstitutional taking of property. Patriot believes that the First Circuit's flawed analysis warrants the issuance of a writ of certiorari.

B. The mere existence of 11 U.S.C. §522(f) at the time Patriot acquired its judicial lien cannot limit Patriot's property interest.

When reconciling regulatory schemes with the Takings Clause, courts engage in a fact-based inquiry involving a three-pronged analysis. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-26 (1978), reh'g denied, 439 U.S. 883 (1978), Eastern Enterprises v. Chater, 110 F.3d 150, 159-62 (1st Cir. 1997), rev'd on other grounds, 524 U.S. 498 (1998). The factors to be considered are "(1) the economic impact of the regulation on the claimant, (2) the

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[8]Regardless of its recognition that Security did not even address the takings argument, the First Circuit nevertheless accepted the holding in Security as a tacit endorsement of its eventual decision that §522(f) did not constitute an unconstitutional taking. See **App.** at 22a.

extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action." Eastern Enterprises v. Chater, 110 F.3d at 160.

The First Circuit held that no taking occurred under §522(f) because Patriot's property interest in its judicial lien was "circumscribed by the debtor's ability under the [Bankruptcy] Code to avoid the lien . . .." See **App**. at 24. In essence, the First Circuit ruled that because §522(f) existed at the time Patriot's judicial lien was recorded, Patriot could have incorporated into its "reasonable investment-backed expectations" the risk that the Bankruptcy Court would perceive a conflict between the Homestead Statute and §522(c), and further could have anticipated that the protection provided to Patriot as a pre-homestead creditor would be eliminated in the event of a bankruptcy. Notwithstanding Patriot's dismay at the First Circuit's implication that such an expectation was "reasonable," the nature of the lien held by Patriot renders the Penn Central analysis inapposite.

Patriot's purported knowledge that §522(f) may be applied to the detriment of its judicial lien is not sufficient to circumvent the Takings Clause. Cf. United States v. Rodgers, 461 U.S. 677, 697, n. 24 (1983);In re Bernier, 176 B.R. 976, 997-98 (Bankr. D. Conn. 1995); In re Axona Int'l Credit Commerce, Ltd., 88 B.R. 597, 617 (Bankr. S.D. NY 1968), aff'd, 115 B.R. 442 (S.D.N.Y. 1990), appeal denied, 924 F.2d 31 (1991), citing, Shanghai Power Co. v. United States, 4 Cl.Ct. 237, 247 (1983). Various judges and commentators have alluded to the potentially absurd result such a policy would encourage. See In re Wiford, 105 B.R. 992, 1003 (Bankr. N.D. Ok. 1989); **James Steven Rogers**, The Impairment of Secured Creditors' Rights in Reorganization, 96 **HARV.L.REV.** 973, 988, n. 61 (Vol. 5,

1983) ("pushed to the extreme, such a theory would enable government to announce as a postulate of positive law, that all rules are subject to change, and would thereby render nugatory any constitutional provision protecting expectations of property or contract rights"), citing **L. Tribe, AMERICAN CONSTITUTIONAL LAW**, §9-6, at 468-69 (1978). The property interest which a creditor obtains with a judicial lien is not subject to the negotiations inherent in consensual liens. Cf. In re Thompson, 867 F.2d 416, 422 (7th Cir. 1989). Unlike a mortgagee, Patriot cannot "protect [its] security by reducing the amount of the loan or refusing to deal with borrowers who are not credit worthy," nor may it "demand compensation for the added risk by charging a higher interest rate." See id. Finally, while such negotiations may affect the value of the property interest, avoidance under §522(f) results in a complete destruction of that interest. See Security, 459 U.S. at 75-76. Regardless of the actual value of the interest taken, it is the absence of a mechanism to compensate the lien holder which renders §522(f) unconstitutional. See **U.S.CONST.** Amend V.

Thus, Patriot's "reasonable investment-backed expectations" could only have included a reliance on the enforceability of the Homestead Statute, with all so-called exceptions intact, in bankruptcy. In other words, Patriot was reasonable in its expectation that its judicial lien would remain recorded against the Residence until the Judgment was satisfied. A debtor's lien avoidance power under §522(f) thwarts this expectation and results in an unconstitutional taking in violation of the Fifth Amendment.

CONCLUSION

For these reasons, the Petitioner requests this Court to issue a writ of certiorari.

Respectfully submitted,

PATRIOT PORTFOLIO, LLC

By its counsel
RIEMER & BRAUNSTEIN LLP

Dated: April __, 1999

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed January 29, 1999]

No. 98-1365

HARRY W. WEINSTEIN,	)
Debtor.	)
	)
PATRIOT PORTFOLIO, LLC	)
Appellant,	)
	)
v.	)
	)
HARRY W. WEINSTEIN, ET AL.,	)
Appellees.	)
	)

JUDGMENT

Entered: January 7, 1999

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court

January 29,1999

By:/s/_____
Janice O'Neil
Chief Deputy Clerk

[cc: Messrs. Ganz, Bernardo, Rao, Ms. Lobell]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[Filed January 7, 1999]

No. 98-1365

HARRY W. WEINSTEIN,	)
Debtor.	)
	)
PATRIOT PORTFOLIO, LLC	)
Appellant,	)
	)
v.	)
	)
HARRY W. WEINSTEIN, ET AL.,	)
Appellees.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Edward F. Harrington, U.S. District Judge]

Before

Boudin, Circuit Judge.

Reavley,* Senior Circuit Judge,

and Lipez, Circuit Judge.

Jeffrey D. Ganz, with whom Kevin J. Simard and Riemer & Braunstein were on brief, for appellant.

Joseph P. Bernardo for appellees.

Anne M. Lobell, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice, with whom Frank W. Hunger, Assistant Attorney General, Donald K. Stern, United States Attorney, and William Kanter, Attorney, were on brief for the United States.

John Rao and National Consumer Law Center, Inc. on brief for National Association of Consumer Bankruptcy Attorneys, amicus curiae.

January 7, 1999

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* Of the Fifth Circuit, sitting by designation.

REAVLEY, Circuit Judge. The question in this bankruptcy appeal is whether, under 11 U.S.C. § 522, a Chapter 7 debtor may assert a homestead exemption for his residence acquired after a debt and attachment of a lien, despite the Massachusetts statute excepting the preexisting lien and debt from homestead protection. The bankruptcy and district courts allowed the homestead protection because Bankruptcy Code § 522 preempted the state exceptions. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The dispute centers on a debt and judicial lien, currently held by Patriot Portfolio, LLC ("Patriot"), and recorded against Harry W. Weinstein's residence in Massachusetts. The judgment lien was recorded on August 4, 1992, at which time Weinstein had owned the property for more than two decades. On April 2, 1996, Weinstein acquired an estate of homestead under Massachusetts law by recording a Declaration of Homestead pursuant to the Massachusetts Homestead Act, Mass. Gen. Laws ch. 188.

On August 26, 1996, Weinstein filed a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code. In his petition, Weinstein claimed a $55,000 homestead exemption in his residence under the Massachusetts homestead statute. Patriot filed an objection, arguing that because both its lien and the underlying debt from which it derived predated Weinstein's acquisition of the estate of homestead, according to section 1(2) of the homestead statute, the exemption does not apply. The bankruptcy court and district court allowed Weinstein to avoid Patriot's assertion, concluding that the Massachusetts provisions excepting prior

contracted debts and preexisting liens from homestead protection were preempted by § 522 of the Code. Because the state exceptions did not apply in bankruptcy, the court avoided Patriot's lien under § 522(f) because, absent the lien, Weinstein would have been entitled to the Massachusetts homestead exemption. The district court affirmed.

II. ANALYSIS

A. Lien Avoidance Under § 522(f)

Bankruptcy Code § 522 allows a debtor to exempt certain property from the bankruptcy estate that the trustee distributes to creditors. See 11 U.S.C. § 522. If the state has not opted out of the federal exemption scheme, § 522(b) allows the debtor to choose between the federal bankruptcy exemptions listed in § 522 (d), other nonbankruptcy federal law, and exemptions under state or local law.[1]

Once the debtor has claimed property as exempt, § 522(c) provides that such exempt property is not liable for any prepetition debt except the specific types enumerated in § 522(c) (1)- (3). These types of debt include debts for certain taxes and customs duties; debt for alimony, maintenance, or support; liens that cannot be avoided; liens that are not void;

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[1] If a state has "opted out" of the federal bankruptcy exemption scheme, which is not the case in Massachusetts, the debtor is limited to exemptions provided under state or local law, or other nonbankruptcy federal law. See 11 U.S.C. § 522(b) (1); 7 Collier on Bankruptcy 1, 301 (Lawrence P. King ed., 15th ed. 1996).

tax liens; and certain nondischargeable debts owed to federal depository institutions.[2] See 11 U.S.C. § 522(c). Assuming for the moment that Patriot's lien can be avoided, none of the above types of debt apply to the facts of this case.

Weinstein chose the state exemption scheme and claimed a $55,000 homestead exemption under the Massachusetts Homestead Act, which provides:

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[2] Section 522(c) provides:

Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose. . . before the commencement of the case, except-

(l) a debt of a kind specified in section 523(a) (1) or 523(a) (5) of this title;

(2) a debt secured by a lien that is-

(A) (i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and (ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a) (4) or 523(a) (6) of this title, owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

11 U.S.C. § 522(c) .

> An estate of homestead to the extent of one hundred thousand dollars in the land and buildings may be acquired pursuant to this chapter by an owner or owners of a home . . . who occupy or intend to occupy said home as a principal residence. Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies except in the following cases:
>
> (1) sale for taxes;
>
> (2) for a debt contracted prior to the acquisition of said estate of homestead;
>
> . . . .

Mass. Gen. Laws ch. 188, § 1 (emphasis added). Additionally, section 5 of the homestead statute withholds homestead protection from any preexisting lien. Specifically, the statute states: "No estate of homestead shall affect a mortgage, lien or other encumbrance previously existing." Id. § 5.

Bankruptcy Code § 522(f) governs lien avoidance. This provision allows avoidance of a judicial lien to the extent the lien impairs an exemption to which the debtor would otherwise be entitled. Section 522(f) provides:

> Notwithstanding any waiver of exemptions . . . the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to

> which the debtor would have been entitled under subsection
> (b) of this section if such lien is-
> (A) a judicial lien ....

11 U.S.C. § 522(f) (1) (emphasis added). The United States Supreme Court interpreted the requirements of § 522(f) in two 1991 decisions. In Farrey v. Sanderfoot, the Court held that in order to "avoid the fixing of a lien on an interest of the debtor in property" under § 522(f), the debtor must have "possessed the interest to which the lien fixed, before it fixed." 500 U.S. 291, 299, 111 S. Ct. 1825, 1830, 114 L.Ed.2d 337 (1991). In Owen v. Owen, the Court held that to determine whether a lien "impairs an exemption to which the debtor would have been entitled" under § 522 (f), the proper question to ask is not whether the lien impairs an exemption to which the debtor is in fact entitled, but rather whether the lien impairs a state or federal exemption to which the debtor would have been entitled but for the lien itself. See 500 U.S. 305, 310-13, 111 S. Ct. 1833, 1836-38, 114 L.Ed.2d 350 (1991). In short, two requirements must be met before a debtor can avoid a lien under § 522 (f): (1) the debtor must have had an ownership interest in the property before the lien attached; and (2) avoidance of the lien must entitle the debtor to a state or federal exemption.

We begin our analysis with the Supreme Court's decision in Owen and assume for the moment that the prior contracted debt exception is preempted by the Bankruptcy Code. In Owen, the Supreme Court considered whether a Chapter 7 debtor can avoid a judicial lien encumbering exempt property, even though the State has defined the exempt property to specifically exclude property encumbered

by preexisting liens, i.e., liens that attached before the property acquired its homestead status. See 500 U.S. at 306-07, 111 S. Ct. at 1834-35. At the same time the debtor purchased a condominium in Sarasota County, Florida, a judgment lien previously recorded by the debtor's former wife immediately attached to the property. See id. The debtor did not qualify for the homestead exemption until a year after he purchased the property, when Florida broadened its homestead exemption. See id. at 307, 111 S. Ct. at 1835. When the debtor later filed for bankruptcy under Chapter 7, he claimed a homestead exemption in the condominium. Following discharge, the bankruptcy court denied the debtor's motion to avoid the lien under § 522(f). The district court and the Eleventh Circuit both affirmed. See id. at 307-08, 111 S. Ct. at 1835.

The Supreme Court, however, rejected the interpretation of § 522(f) urged by the creditor and employed by the courts below - that the state exemption statute's built-in limitations are fully operative in bankruptcy. Under the creditor's view, the lien obviously did not impair the debtor's homestead exemption since under Florida law, the exemption does not apply to preexisting liens. See id. at 309, 111 S. Ct. at 1836. Noting that bankruptcy courts had uniformly rejected this approach with respect to federal exemptions, the Supreme Court saw no justification for treating federal and state exemptions differently. See id. at 310-13, 111 S. Ct. at 1836-38. Tracking the language of the Code, the Supreme Court held that when applying § 522(f) to either federal or state exemptions, the question is "not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which [the debtor] would have been entitled but for the lien itself." Id. at 310-11, 111 S. Ct.

at 1836-37. In other words, if "avoiding the lien would entitle the debtor to an exemption . . . then avoid and recover the lien." Id. at 312-13, 111 S. Ct. at 1837. In reaching this conclusion, the Owen Court expressly rejected the notion that because the Code's "opt-out" policy allows States to define their own exemptions, those exemptions must be applied with all their built-in limitations. See id. at 313, 111 S. Ct. at 1838 ("We have no basis for pronouncing the opt-out policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains."). The Court ultimately concluded that Florida's exception for preexisting liens did not preclude avoidance of the lien in bankruptcy under § 522(f):

> On the basis of the analysis we have set forth above with respect to federal exemptions, and in light of the equivalency of treatment accorded to federal and state exemptions by § 522(f), we conclude that Florida's exclusion of certain liens from the scope of its homestead protection does not achieve a similar exclusion from the Bankruptcy Code's lien avoidance provision.

Id. at 313-14, 111 S. Ct. at 1838. The Supreme Court then remanded the case to the Eleventh Circuit to determine if the requirements of Farrey had been met, i.e., whether the debtor acquired the property interest before the lien attached.[3]

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[3] On remand, the Eleventh Circuit concluded that the attachment of the lien and the debtor's acquisition of the property occurred simultaneously. Thus, because the debtor did not acquire

Owen governs the disposition of this issue. As in Owen, Patriot's lien predated Weinstein's acquisition of the estate of homestead. Both Florida and Massachusetts law except preexisting liens from homestead protection. Following the clear command of Owen, the Massachusetts exception for preexisting liens is inoperative in bankruptcy and must yield to the Code's lien avoidance provision. See id. Thus, we hold that Bankruptcy Code § 522(f) preempts Mass. Gen. Laws ch. 188, § 5.

We are unimpressed by Patriot's attempt to distinguish this case from Owen. Patriot asserts that the Massachusetts homestead exemption is unique because, contrary to the homestead exemption provided under Florida law, other state statutes, and federal law, in Massachusetts the underlying real estate is not exempt. Rather, the Massachusetts statute creates a separate asset - the "estate of homestead" - that is distinct from the debtor's interest in the underlying real property. Relying on this premise, Patriot argues that Massachusetts law must be applied in its entirety to determine the nature and value of the estate of homestead. We view this characteristic as a distinction without a difference, which does not warrant different treatment under the Code. Moreover, we note that the 19th century cases Patriot relies on for support neither

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the property interest before the lien fixed, the Eleventh Circuit held that "there was never a fixing of a lien on an interest of the debtor," and therefore the debtor could not avoid the lien under § 522(f). See In re Owen, 961 F.2d 170, 172 (11th Cir. 1992) (emphasis omitted).

address nor control bankruptcy issues. See, e.g., Pratt v. Pratt, 37 N.E. 435 (Mass. 1894); Weller v. Weller, 131 Mass. 446, 447 (1881).

B. Preemption of the Prior Contracted Debt Exception

We now turn to the question of whether the Bankruptcy Code preempts the Massachusetts prior contracted debt exception, Mass. Gen. Laws ch. 188, § 1(2). Unless this exception is also preempted, Weinstein could not claim the homestead exemption since he contracted for the underlying debt before he acquired the homestead estate.

We begin by comparing § 522(c) with Mass. Gen. Laws ch. 188, § 1(2), to determine if there is a conflict. Section 522(c) provides that during or after bankruptcy, exempt property is not liable for any prepetition debts except those debts specified in subparagraphs (1)-(3). See 11 U.S.C. § 522(c) (1)-(3). This list includes: (1) debts for certain taxes and customs duties; (2) debts for alimony, maintenance, or support; (3) liens that cannot be avoided; (4) liens that are not void; (5) tax liens; and (6) certain nondischargeable debts owed to federal depository institutions. See id. The exceptions in the Massachusetts homestead statute serve a similar function by withholding homestead protection under state law from certain types of debt. Section 1 provides in relevant part:

> Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies except in the following cases:
>
> (1) sale for taxes;

> (2) for a debt contracted prior to the acquisition of said estate of homestead;
>
> (3) for a debt contracted for the purchase of said home;
>
> (4) upon an execution issued from the probate court to enforce its judgment that a spouse pay a certain amount weekly or otherwise for the support of a spouse or minor children;
>
> (5) where buildings on land not owned by the owner of a homestead estate are attached, levied upon or sold for the ground rent of the lot whereon they stand;
>
> (6) upon an execution issued from a court of competent jurisdiction to enforce its judgment based upon fraud, mistake, duress, undue influence or lack of capacity.

Mass. Gen. Laws ch. 188, § 1(1)-(6). The heart of Patriot's argument is that there is no conflict between section 522(c) and the Massachusetts homestead statute.[4] Patriot asserts that

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[4] We note that Patriot actually argued that there is no conflict between § 522(c) and section 5 of the homestead statute. However, this argument is misplaced because the bankruptcy court did not engage in a conflict analysis between § 522(c) and section 5. Rather, the court held that § 522(c) preempted the section 1(2) prior contracted debt exception, see In re Weinstein, No. 96-16431-WCH (Bankr. D. Mass. Mar. 25, 1997), and that § 522(f) preempted section 5. See Patriot Portfolio v. Weinstein, Ch. 7 Case

the"property exempted" for purposes of section 522(c) must be defined by Massachusetts law, including all of its built-in limitations. Under this view, the exceptions to the homestead statute operate to define the value of the estate, which is the "property exempted," and therefore there is no conflict between § 522(c) and section 1(2). Weinstein, on the other hand, urges us to adopt the view espoused by the First Circuit Bankruptcy Appellate Panel and a majority of the Massachusetts bankruptcy judges - that § 522(c) conflicts with and preempts the prior contracted debt exception. See In re Fracasso, 222 B.R. 400 (B.A.P. 1st Cir. 1998); In re Leicht, 222 B.R. 670 (B.A.P. 1st Cir. 1998); In re Mills, 211 B.R. 1 (Bankr. D. Mass. 1997) (Kenner, J.); In re Whalen-Griffin, 206 B.R. 277 (Bankr. D. Mass. 1997) (Feeney, J.); In re Boucher, 203 B.R. 10 (Bankr. D. Mass. 1996) (Queenan, Jr., J.). According to this view, exempt property in a bankruptcy case remains liable only for the specific types of debt listed in § 522(c) (1)-(3). Because the Massachusetts prior contracted debt exception is not one of the types of debt specified in § 522(c), it is invalid in bankruptcy. We are persuaded by Weinstein's argument.

Congress has plenary power to enact uniform federal bankruptcy laws. See U.S. Const. art. 1, § 8, cl. 4; International Shoe Co. v. Pinkus, 278 U.S. 261, 265, 49 S. Ct. 108, 110, 73 L. Ed. 318 (1929). Consequently, "[s]tates may not pass or enforce laws to interfere with or complement

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No. 96-16431-WCH, Adv. No. 97-11470-EFH (Bankr. D. Mass. Jan. 7, 1998). But, because the heart of Patriot's argument applies to the conflict between § 522(c) and section 1(2), we address it here.

the Bankruptcy Act or to provide additional or auxiliary regulations." International Shoe Co.,278 U.S. at 265, 49 S. Ct. at 110 (noting that the intent of Congress in establishing uniform bankruptcy laws necessarily excludes inconsistent state regulation). We recognize that Congress afforded significant deference to state law by allowing bankruptcy debtors to choose state exemptions and by further allowing states to opt out of the federal exemption scheme entirely. See In re Boucher, 203 B.R. at 12 (citing 11 U.S.C. § 522(b)). Yet, such deference does not warrant the conclusion that the "property exempted" in section 522(c) must be defined by first applying all the built-in exceptions to the state exemption statute. As the Supreme Court recognized in discussing the interplay between § 522 f) and state exemption exceptions in Owen, the state's ability to define its exemptions is not absolute and must yield to conflicting policies in the Bankruptcy Code. See Owen, 500 U.S. at 313, 111 S. Ct. at 1838. Although Massachusetts has not opted out of the federal exemption scheme, as was the case in Owen, the analysis applies equally where the debtor chooses the state exemption scheme.

Like the bankruptcy court and the district court below, we are persuaded by Judge Feeney's analysis of the conflict in In re Whalen-Griffin. As Judge Feeney recognized, the Massachusetts exceptions overlap and conflict with § 522(c). See 206 B.R. at 290. While both statutes limit the debts for which exempt property remains liable, the Massachusetts exceptions protect debts left unprotected by § 522 (c). We agree with Judge Feeney's conclusion that:

> Because the exceptions to the Massachusetts homestead have the same effect on the

> homestead as the exceptions set forth in § 522 (c),. . . the Massachusetts homestead statute is preempted to the extent that it permits exempt property to be liable for debts other than those expressly enumerated in § 522(c) (1)-(3), particularly because the language employed by Congress in § 522(c) is devoid of ambiguity.

206 B.R. at 291-92. On this basis, we conclude that section 1(2) of the homestead statute is preempted by § 522(c) of the Code. See Rini v. United Van Lines, Inc., 104 F.3d 502, 504 (lst Cir. 1997) ("[A] state statute is void to the extent it is in conflict with a federal statute." (citing Maryland v. Louisiana, 451 U.S. 725, 747, 101 S. Ct. 2114, 2129, 68 L.Ed.2d 576 (1981))), cert. denied, 118 S. Ct. 51, 139 L.Ed.2d 16 (1997). Our conclusion is consistent with numerous decisions in other jurisdictions holding that a state's exceptions to its homestead exemption are preempted by the Bankruptcy Code. See, e.g., In re Maddox,15 F.3d 1347, 1351 (5th Cir. 1994) (holding that lien avoidance under § 522(f) is not limited by state exceptions); In re Opperman, 943 F.2d 441, 443 (4th Cir. 1991) (holding that limitation in North Carolina homestead statute was invalid to the extent it conflicted with operation of § 522(f)); In re Scott,199 B.R. 586, 591-93 (Bankr. E.D. Va. 1996) (holding that intentional tort exclusion in Virginia exemption statute conflicts with and is preempted by § 522(c)); In re Conyers, 129 B.R. 470, 472 (Bankr. E.D. Ky. 1991) (concluding that "the determination of the types of debts that remain collectible after bankruptcy from exempt property is controlled by federal rather than state law").

In so holding, we again reject Patriot's insistence that the courts below and the cited Massachusetts bankruptcy

courts have all misconstrued the unique character of the Massachusetts homestead exemption. We do not view the Massachusetts statute's creation of an "estate of homestead" to be so markedly different from the homestead exemptions available under federal or other state's laws that it need not yield to the overriding policies of § 522(c). See In re Leicht, 222 B.R. at 680 ("[W]e decline [the debtor's] invitation to recognize the Massachusetts homestead as so different in character from other exemptions that § 522(c)'s fresh start mechanism cannot operate to enlarge its protections.").

C. Application of § 522(f)

The judgment here meets the requirements of Farrey and Owen because Patriot's lien "fixed" upon Weinstein's interest in the property, and the lien impaired an exemption to which Weinstein was entitled.

Section 522(f) allows a debtor to "avoid the fixing of a lien on an interest of the debtor in property." In Farrey, the Supreme Court construed this phrase to mean that the debtor must have "possessed the interest to which the lien fixed, before it fixed." 500 U.S. at 299, 111 S. Ct. at 1830. Patriot insists that because its lien never "fixed" upon any exempt property, it cannot be avoided under § 522(f). Patriot essentially argues that the relevant "interest of the debtor in property" that must exist before the lien attaches is the estate of homestead. We disagree. Not only does the language of § 522(f) not refer to an "exempt interest," the Supreme Court's analysis in Owen also substantially undercuts this position. In Owen, the Supreme Court remanded the case to the Eleventh Circuit to consider whether the lien ever fixed upon the debtor's interest in the property itself since the debtor may

have acquired the property at the same time the lien attached. See 500 U.S. at 314, 111 S. Ct. at 1838. On remand, the Eleventh Circuit held that there was no "fixing of a lien on an interest of the debtor" because under the Florida after-acquired property statute, the lien attached at the same moment the debtor acquired the property. See In re Owen, 961 F.2d 170, 172 (llth Cir. 1992). Therefore, the debtor could not avoid the lien under § 522(f). See id. at 173. Both the Supreme Court's and the Eleventh Circuit's analysis turned on whether the debtor had acquired an ownership interest in the property before the lien attached, and not whether the debtor had acquired the homestead exemption before the lien attached. If, as Patriot argues, § 522 (f) requires the debtor to have an interest in the exemption before the lien attached, the Court in Owen need not have remanded the case since the facts clearly showed that the debtor did not have an exempt interest in the property before the lien attached. We cannot reconcile Patriot's interpretation with that of Owen. We also note that Patriot's argument has been expressly rejected by several courts in other jurisdictions. See, e.g., In re Maddox, 15 F.3d 1347, 1351-52 (5th Cir. 1994) ("Nothing in the statute specifies the need for attachment to an exemptible interest of the debtor in the property; at a minimum, the Debtor's ownership interest in the property at issue here suffices."); In re Hastings, 185 B.R. 811, 815 (B.A.P. 9th Cir. 1995); In re Johnson, 184 B.R. 141, 146 (Bankr. D. Wyo. 1995).

There is no dispute that Weinstein owned the residence several years before Patriot's lien attached to the property. Consequently, Weinstein "possessed the interest to which the lien fixed, before it fixed." Farrey, 500 U.S. at 299, 111 S. Ct. at 1830. Applying the clear command of Owen, but for

Patriot's lien, Weinstein would be entitled to the $55,000 homestead exemption claimed in his petition. See Owen, 500 U.S. at 310-13, 111 S. Ct. at 1836-38. The state's prior contracted debt exception no longer enters into the mix. On these facts, we conclude that the bankruptcy court properly avoided Patriot's lien under § 522(f).

D. Fifth Amendment Takings Claim

Patriot claims avoidance of its lien under § 522(f) violates the Fifth Amendment Takings Clause. Even if Patriot did not seasonably raise the argument below,[5] we nevertheless

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[5] The district court refused to address the merits, rejecting Patriot's contention that it had no opportunity to raise its constitutional argument because, after initially sustaining Patriot's objection and closing the case, the bankruptcy court reconsidered and reversed its prior decision sua sponte without notice or further hearing. The district court noted that Patriot could have raised the constitutional argument either in its initial objection or in a motion for reconsideration. See In re Weinstein, 217 B.R. 5, 7-8 (Bankr. D. Mass. 1998). We, however, do not consider Patriot's failure to challenge the constitutionality of § 522(f) in its objection fatal because, at that point, Weinstein had not yet moved to avoid the lien. Additionally, it is not certain that Patriot could have preserved the issue by raising it for the first time in a motion for reconsideration. Compare United States v. Hassan, 83 F.3d 693, 696 (5th Cir. 1996) (holding that the government did not waive argument for appeal by raising it for the first time in a motion for reconsideration), with Intercontinental Travel Mktg., Inc. v. FDIC, 45 F.3d 1278, 1286 (9th Cir. 1994) (refusing to consider due process argument raised for the first time in a motion for reconsideration). In any event, as discussed infra, we believe it is appropriate to address the merits of Patriot's constitutional claim

believe it is appropriate to address the merits of Patriot's constitutional challenge.

In this circuit, the general rule is that issues raised for the first time on appeal are waived. See In re Rauh, 119 F.3d 46, 51 (1st Cir. 1997). However, appellate courts have discretion to address issues not seasonably raised below, depending upon the individual facts of the case. See Singleton v. Wulff, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Exercise of our discretion is appropriate where, as here: the new issue is purely a question of law; addressing the merits would promote judicial economy as the same issue will likely be raised in other cases; and the claim raises an issue of constitutional magnitude, which if meritorious, could substantially affect the rights of creditors and debtors in this and future bankruptcy proceedings. See, e.g., In re 604 Columbus Ave. Realty Trust, 968 F.2d 1332, 1343-44 (1st Cir. 1992); United States v. La Guardia, 902 F.2d 1010, 1013 (1st Cir. 1990); cf. Petitioning Creditors of Melon Produce, Inc. v. Braunstein, 112 F.3d 1232, 1236-37 (1st Cir. 1997).

Although Congress has broad constitutional authority to enact bankruptcy laws, see U.S. Const. art. I, § 8, "[t]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation." United States v. Security Indus. Bank, 459 U.S. 70, 75, 103 S. Ct. 407, 410, 74 L.Ed.2d 235 (1982).

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despite the possible procedural default.

The debtor does not dispute that Patriot's judicial lien constitutes "property" within the meaning of the Fifth Amendment Takings Clause. See Brief for the Appellee, at 22; see also Security Indus. Bank, 459 U.S. at 75-78, 103 S. Ct. at 410-12; Armstrong v. United States, 364 U.S. 40, 44-46, 80 S. Ct. 1563, 1566-67, 4 L.Ed.2d 1554 (1960). Nor is there any dispute that § 522(f) applies prospectively in this case, as Patriot's lien was recorded against the residence in 1992, more than a decade after section 522(f) became effective on October 1, 1979. See Bankruptcy Reform Act, Pub. L. No. 95-598, § 402, 92 Stat. 2589 (1978).

The Supreme Court has not specifically addressed the constitutionality of prospective application of § 522(f). In United States v. Security Industrial Bank, the Court discussed the constitutionality of retroactive application of § 522(f) to liens created before its enactment, but ultimately declined to reach the issue. See 459 U.S. at 74-82, 103 S. Ct. at 410-14. Concluding that "there is substantial doubt whether the retroactive destruction of the appellees' liens in this case comports with the Fifth Amendment," id. at 78, 103 S. Ct. at 412, the Court construed the statute to have only prospective and not retrospective effect. Id. at 78-82, 103 S. Ct. at 412-14. Some courts have concluded that Security Industrial Bank strongly suggests if not implicitly holds that prospective application of § 522(f) would not impermissibly tread on the Takings Clause. See, e.g., In re Thompson, 867 F.2d 416, 422 (7th Cir. 1989); In re Leicht, 222 B.R. 670, 682-83 (B.A.P. 1st Cir. 1998). While we agree that the Supreme Court's analysis in Security Industrial Bank supports our holding, we acknowledge that it is not dispositive.

Penn Central Transportation v. City of New York, 438

U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L.Ed.2d 631 (1978), sets forth the analytical framework for resolving Patriot's takings challenge. See Security Indus. Bank, 459 U.S. at 75, 103 S. Ct. at 411 (stating that lien avoidance under § 522(f) "fits but awkwardly into the analytic framework employed in Penn Central Transp. Co."). Courts addressing regulatory taking claims consider three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations; and (3) the character of the governmental action. See Penn Cent. Transp. Co., 438 U.S. at 124, 98 S. Ct. at 2659.

Regarding the first factor, Patriot complains that avoidance of its lien completely destroyed its property interest in the debtor's residence. As to the second factor, Patriot further insists that lien avoidance was not within its reasonable investment-backed expectations, i.e., "that the lien will continue to exist until such time as the underlying debt is satisfied or the debtor's interest in the property subject to the lien is extinguished."

In this Circuit, the Bankruptcy Appellate Panel ("BAP") recently rejected an identical takings challenge in In re Leicht, 222 B.R. 670 (B.A.P. 1st Cir. 1998). Although the BAP's decision is not binding on this Court, we find it convincing. There, the BAP rejected the argument that avoidance of the creditor's judicial lien "completely destroyed the property interest that [the creditor] had in the Residence." Id. at 684. The BAP held that no property interest was taken from the creditor because its property rights in the judicial lien were circumscribed by the federal lien avoidance provision in effect when those rights were created. See id. at

683. Although the lien was a protected interest under the Fifth Amendment, at its inception, the lien was subject to and limited by the debtor's power to avoid the lien under § 522(f). See id. Because § 522(f) was in effect when the creditor's lien arose, no taking occurred when the lien was later avoided under that provision. See id. at 684; see also In re Thompson, 867 F.2d at 422 ("[L]ien avoidance is not a taking when it is authorized before the creditor makes the secured loan in question. . . . "); In re Snellings, 10 B.R. 949, 956 (Bankr. W.D. Va. 1981) ("[T]hose liens created after the enactment of the Bankruptcy Reform Act of 1978. . . are implicitly subject to the debtor's power to avoid liens on exempt property under section 522(f).").

Applying the sound reasoning of In re Leicht, we reject Patriot's argument that avoidance of its judicial lien completely destroyed its property interest. Patriot's judicial lien was perfected in 1992, thirteen years after § 522(f) became effective in 1979. Because Patriot's property rights in the lien are circumscribed by the debtor's ability under the Code to avoid the lien, prospective application of § 522(f) does not constitute a "taking" of Patriot's property interest within the meaning of the Fifth Amendment Takings Clause. As no taking occurred, we need not discuss the other Penn Central factors.

E. Sua Sponte Reconsideration and Reversal

Finally, Patriot complains that the bankruptcy court abused its discretion by reopening the case on its own motion, reversing its original decision, and avoiding Patriot's lien

without notice or further hearing.[6] We review the bankruptcy court's discretionary decision to reopen the case and reconsider its prior decision for an abuse of discretion. See In re Gonic Realty Trust, 909 F.2d 624, 626 (lst Cir. 1990). Patriot acknowledges that the bankruptcy court had broad discretion under Bankruptcy Code §§ 105(a) and 350(b) to reopen the case on its own motion to avoid its lien.[7]

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[6] Following the December 10th hearing, the bankruptcy court initially sustained Patriot's objection, denied Weinstein's motion to avoid the lien, and closed the case. Two months later, in light of Judge Feeney's subsequent decision in In re Whalen-Griffin, the bankruptcy court reopened the case sua sponte, vacated its prior decision and avoided Patriot's lien. See In re Weinstein, Ch. 7 Case No. 96-16431-WCH (Bankr. D. Mass. Mar. 25, 1997).

[7] Bankruptcy Code § 350(b) authorizes a bankruptcy court to reopen a case sua sponte to "accord relief to the debtor," which includes lien avoidance. See 11 U.S.C. § 350(b); In re Cummings, 172 B.R. 268, 270-71 (Bankr. W.D. Ark. 1994) (holding that lien avoidance is sufficient cause for reopening a chapter 7 case under § 350(b)). Additionally, § 105(a) grants broad authority to the bankruptcy court to reconsider and reverse its prior decisions if necessary to carry out the provisions of the bankruptcy code. See 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); In re H.K. Porter Co., 156 B.R. 149, 150 (Bankr. W.D. Pa. 1993) ("[T]he Bankruptcy Court has the 'ancient and elementary power' to reconsider any of its orders." (quoting Brielle Assoc. v. Graziano, 685 F.2d 109, 111 (3d Cir. 1982))

Nevertheless, Patriot complains that the bankruptcy court's sua sponte decision to avoid its lien without notice or further hearing violated its procedural due process rights since it had no formal opportunity to address the lien avoidance issue. We disagree. First, Patriot had already presented its principal arguments to the bankruptcy court prior to the court's first decision. Second, despite the procedural posture in which the issue was raised, at a minimum, Patriot could have raised its constitutional argument at the December 10th hearing, if not in a motion for reconsideration. Moreover, because we have fully considered the merits of Patriots constitutional claim, any resulting prejudice from Patriot's alleged inability to raise this argument below has been cured. Consequently, because Patriot has suffered no prejudice, we agree with the district court's conclusion that the bankruptcy court did not abuse its discretion.

III. CONCLUSION

For the reasons stated above, we hold that Bankruptcy Code §§ 522(f) and 522(c) preempt the Massachusetts provisions excepting preexisting liens and prior contracted debts from homestead prosection. The bankruptcy court properly avoided Patriot's lien under § 522(f).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1365

HARRY W. WEINSTEIN, Debtor.	)
PATRIOT PORTFOLIO, LLC, Appellant,	)
v.	)
HARRY W. WEINSTEIN, ET AL., Appellees.	)

ERRATA

The opinion of this court issued on January 7, 1999, should be amended as follows:

Page 15, line 21, should be revised to read: "creditor's] invitation to recognize the Massachusetts homestead as so".

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed February 12, 1998]

Civil Action No. 97-11470-EFH

In Re: HARRY W. WEINSTEIN,
Debtor.

MEMORANDUM AND ORDER

HARRINGTON, D.J.

This is an appeal from a March 25, 1997 Order of the Honorable William C. Hillman, United States Bankruptcy Judge. The Order denied Appellant Patriot Portfolio, LLC's ("Appellant's") Objection to the Homestead Exemption claimed by the Debtor - Appellee Harry W. Weinstein ("the Appellee") in his bankruptcy case. The case is properly before this Court pursuant to 11 U.S.C. § 158(a)(1).

Standard of Review

The Bankruptcy Court's findings of fact are not in dispute. The question of the proper application of the Massachusetts Homestead Act in the context of this federal bankruptcy proceeding is a question of law. On an appeal of

a final order of a bankruptcy Court, this Court reviews question of law *de novo*. In re Goldman. 192 B.R. 1, 5 (D.Mass. 1996); citing, In re G.S.F.Corp., 938 F.2d 1467, 1474 (1st Cir. 1991).

The Bankruptcy Courts decisions (1) to reopen the Appellee's bankruptcy case under 11 U.S.C. § 350(b) and (2) to reverse itself, *sua sponte,* are within its discretion. Hence, this Court reviews those decisions only to determine if the Bankruptcy Court abused its discretion. See In re Sheerin, B.R. 438, 440 (Bankr. 1st Cir. 1982).

The Homestead Act and the Bankruptcy Code

The primary claim in this appeal is that the Bankruptcy Court erred in determining that the Massachusetts Homestead Act (Mass. Gen.L. ch. 188) was preempted by the Bankruptcy Code in the instant circumstances. Paragraph Three of Judge Hillman's Order States:

> Whereas based upon Griffin [In re Griffin, 206 B. R. 277 (Bankr.D.Mass. 1997], I conclude that once a debtor has filed for relief, the applicable provisions of the Bankruptcy Code pre-empt the exceptions to the Massachusetts homestead exemption.

The exceptions to the homestead exemption, referred to in Judge Hillman's Order, are listed in Section One of the Homestead Act. Mass. Gen.L. ch. 188 § 1 (1)-(6). The second exception listed in Section One excludes from a homestead "a[ny] debt contracted prior to the acquisition of said estate of homestead." Mass.Gen.L. ch. 188 § 1(2).

Four of the Judges of the Bankruptcy Court for the District of Massachusetts have ruled that this exception to the Massachusetts Homestead Exemption is preempted by the Bankruptcy Code. See In re Whalen-Griffin, 206 B.R. 277(Bankr.D.Mass. 1997); In Re Boucher, 203 B.R. 10 (Bankr.D.Mass. 1996); In re Mills, Lawyers Weekly No. 03-050-97 (Bankr.D.Mass. Aug 18, 1997, Kenner J.). Only Judge Henry Boroff has held to the contrary. See In re Fracasso, 210 B.R. 221 (Bankr.D.Mass. 1997).

After reviewing the memoranda of the parties in this case, and the Bankruptcy Court decisions from the District of Massachusetts which explore the interplay between the Bankruptcy Code and the Massachusetts Homestead Act, I am convinced that Judge Hillman's decision is sound. The exception for prior contracted debts and previously recorded judicial liens under the Massachusetts Homestead Act are preempted because they conflict with 11 U.S.C. § 522.[1]

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[1] 11 U.S.C. § 522(c) states; Unless the case is dismissed, property exempted under this section *is not liable* during or after the case *for any debt* of the debtor *that arose*, or that is determined under 502 of this title as if such debt had arisen, *before the commencement of the case*, except - [emphasis added]

(1) a debt of the kind specified in section 523(a)(1) or section 523(a)(5) of this title; or

(2) a debt secured by a lien that is -

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724 (a) of this title; or

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of

Judge Hillman explicitly relied upon the language of the code and the opinion of Judge Feeney in In re Whalen-Griffin, in determining that the Bankruptcy Code preempted the statutory exceptions to the Homestead Act. Judge Hillman's reliance upon In re Whalen-Griffin was well founded. This Court too is persuaded by the reasoning in In re Whalen-Griffin. In addition, this Court's decision to affirm Judge Hillman's order is based upon the reasoning and insight in Boucher where Judge Queenan ruled that the Bankruptcy Code preempted the state exception for prehomestead debt. In re Boucher, 203 B.R. at 12. In so ruling, Judge Queenan noted that the fundamental issue in the case arose out of the "difference between the function of the state homestead exemption outside of bankruptcy and the way it operates in bankruptcy." Id at 13. Outside of bankruptcy proceedings, the Massachusetts Homestead Act protects debtors against individual creditors. While within the bankruptcy context, the Court must interpret the law in the context of its duty to administer a "collective proceeding" designed to balance the interests of all creditors. Id.

Initially, this Court was concerned that this case might be distinguishable from Boucher and In re Whalen-Griffin,

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this title owed by an institution-affiliated party of an insured depository institution [sic] regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

11 U.S.C. § 522(f) states: (1) Notwithstanding any waiver of exemption but subject to paragraph (3), the *debtor may avoid the fixing a lien on an interest of the debtor in property to the extent that such lien impairs an exemption* to which the debtor would have been entitled under subsection (b) of this section, *if such lien is* -

(A) a judicial lien [emphasis added]

since the prior contracted debt in this case was secured while the debt in those cases was unsecured. Consequently, on December 23, 1997, this Court remanded the case to Judge Hillman for further consideration. On January 7, 1998, Judge Hillman affirmed his earlier decision and ruled that the secured - unsecured distinction was not material. In so ruling, Judge Hillman again relied upon the reasons set forth in In re Whalen-Griffin. After reviewing the facts and the relevant case law, this Court concurs with Judge Hillman's decision. The statutory conflict regarding judicial liens, between 11 U.S.C. § 522 (f) of the Bankruptcy Code and Section 5 of the Homestead Act (Mass.Gen.L.ch. 188, §5), is nearly identical to the statutory conflict between 11 U.S.C. § 522(c) and Mass.Gen.L.ch 188, §1(2), regarding the prior contracted debt exception. Therefore, this Court affirms Judge Hillman's decision that the Bankruptcy Code also preempts the lien exception described in Section 5 of the Massachusetts Homestead Act.

The Constitutionality of 11 U.S.C. § 522(f)

On appeal and for the first time in this case, appellant has raised a constitutional challenge to Section 522(f). Since the appellant did not raise, and the Bankruptcy Court did not consider, the issue of whether Section 522(f) violates the "takings clause" of the Fifth Amendment, this Court will not consider the issue.

It is well established that appellate courts will not consider an issue which was not before the trial court and which is first raised on appeal. Singleton v. Wulff, 428 U.S. 106, 120 (1976). In a recent bankruptcy appeal, the First Circuit followed the general rule and refused to consider a

new theory of the case first raised on appeal since it had not been presented to the bankruptcy court. In re Rauh, 119 F.3d 46, 51 (1st Cir. 1997). Exceptions to this rule are rare and courts in this Circuit will consider arguments raised for the first time on appeal only in exceptional circumstances threatening a "clear miscarriage of justice," Playboy Enter. Inc. v. Public Serv. Commm'n of Puerto Rico, 906 F.2d 25, 40 (1st Cir. 1990). Appellant claims that its failure to raise the issue should be excused because of the special circumstances involving the *sua sponte* reopening of the case. However, this argument ignores the fact that the appellant had two opportunities to raise the constitutionality of Section 522(f). Appellant could have presented the issue to the Bankruptcy Court in its initial objection or it could have raised the issue in a Motion for Reconsideration after the Court had issued its final order. Since the appellant could have preserved its rights regarding the issue by pursuing either of these options, and since the appellant has failed to show that the Bankruptcy Court's order threatens a clear miscarriage of justice, this Court rules that no exceptional circumstances exist in this case. As such, this Court lacks jurisdiction to hear the appellant's appeal on constitutional grounds.

Reopening and Reversing the Bankruptcy Case *Sua Sponte*

Appellant contends that the Bankruptcy Court abused its discretion (1) by reopening the debtor's case *sua sponte* and (2) by reversing its earlier decision without further hearing. This Court rules that neither of these acts constitute an abuse of discretion.

Judge Hillman reopened the case pursuant to 11 U.S.C. § 350(b). Section 350(b) allows a bankruptcy court

to reopen a case *sua sponte*. Specifically, the statue provides: "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b).

In the instant dispute, the Bankruptcy Court reopened the case to permit the appellee to avoid the judicial lien held by the appellant. This purpose clearly falls within the "accord relief to a debtor" provision of Section 350(b). Hence, the Bankruptcy Court was well within its discretion in deciding to reopen the case.

Once the Bankruptcy Court reopened the appellee's case, it had the authority to reverse its decision and modify the debtor's exemptions without further hearing. Section 105(a) of the Bankruptcy Code provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent abuse of process.

11 U.S.C. § 105(a)

Section 105(a) grants the Bankruptcy Court broad authority to reconsider any of its own orders and to issue new orders *sua sponte* whenever necessary to carry out provision of the Bankruptcy Code. In re H.K. Porter Company, Inc., 156 B.R. 149, 150 (Bankr. W.D. Pa. 1993) citing, In re

Brielle Associates, 685 F.2d 109, 111 (3d Cir. 1982).

Moreover, in this case, the appellant cannot show that it was unduly prejudiced by the Court's decision to reverse itself without further hearing. The appellant had already presented its principal argument to the Court prior to the Court's first decision. The Court dearly understood the appellants argument and was initially persuaded by it. However, after reviewing the In re Whalen-Griffin decision and reflecting upon the facts of the case, the Court ultimately reversed itself and ruled in favor of the appellee. In such circumstances, the appellant cannot successfully argue that it was denied an opportunity to be heard.[2]

Conclusion

For the reason state above, this Court affirms the March 25, 1997 Order of the Bankruptcy Court.

/s/_____
EDWARD F. HARRINGTON
United States District Judge

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[2] Appellant's contention that it was unfairly prejudiced by the sua sponte ruling because it was prevented from raising the ancillary argument regarding the constitutionality of Section 522(f) is meritless. The appellant could have preserved its rights regarding the issue by either presenting the issue to the Bankruptcy Court in its initial objection or raising the issue in a Motion for Reconsideration after the Bankruptcy Court issued its final order.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

[Filed January 7, 1998]

Civil Action No. 97-11470-EFH
Chapter 7 96-16431-WCH

PATRIOT PORTFOLIO, ET AL.,	)
Appellants	)
	)
v.	)
	)
HARRY W. WEINSTEIN,	)
Appellee.	)
	)
	)

DECISION ON MEMORANDUM AND ORDER OF REMAND

On December 23, 1997, Judge Harrington issued his Memorandum and Order of Remand in which he asked that I consider whether the fact that the Appellants are secured creditors would affect my order dated March 25, 1997. I conclude that it does not.

In my initial decision, I denied the Appellee's request

to avoid the Appellants' judicial lien. My conclusion rested on an analysis of 11 USC §522(f), Mass. Gen. Laws ch. 188, §1(2) and the United States Supreme Court's decision *Owen v. Owen,* 500 U.S. 305 (1991).

Under §522(f), a "debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien -- is (A) a judicial lien..." Under § 1 (2), an estate of homestead is exempt from the payment of debts except for a debt which a debtor contracted prior to the filing of the declaration of homestead. In *Owen,* the Supreme Court held that 11 U.S.C. §522(f) dictates that a lien must be avoided if it impairs an exemption to which a debtor would have been entitled if the lien were avoided, not an exemption to which the debtor is entitled. *Owen,* 500 U.S. at 312.

Based upon the foregoing, in my decision I concluded as follows:

> Under Owen, in order to decide whether Patriot's lien can be avoided, I must determine whether, absent Patriot's lien, the Debtor would be entitled to a homestead exemption. The answer is no. Unlike Florida, the exception to the homestead exemption in Massachusetts refers to "debts" contracted prior to the declaration of homestead instead, not liens. Accordingly, even if I were to avoid the lien, the exception to the homestead exemption would still be applicable because Patriot would continue to hold an unsecured claim pre-dating the homestead exemption .... Because the Debtor cannot demonstrate that he would otherwise be entitled to his homestead

exemption, lien avoidance would be inappropriate.

In my March order, I vacated the prior decision and followed Judge Feeney's decision *In re Whalen-Griffin,* 206 B.R. 277 (Bankr. D. Mass. 1997)(holding that the applicable provisions of Bankruptcy Code pre-empt the Massachusetts exceptions to homestead exemption). Because the result was that there was no longer an exception to the exemption, I ruled that the judicial lien was avoidable because it impaired an exemption to which the Debtor/Appellee was entitled absent the judicial lien. In his remand order Judge Harrington asked that I consider the issue of the Appellants holding a secured claim and §5 of Mass. Gen. Laws ch. 188 which provides that "No estate of homestead shall affect a mortgage, lien, or other encumbrance previously existing."

Similar to the statutory conundrum in *Whalen-Griffin,* §5 conflicts with an applicable provision of the Bankruptcy Code. That is, under 11 U.S.C. § 552(f), a judicial lien may be avoided if it impairs an exemption to which a debtor would have been entitled absent the lien. *Owen,* 500 U.S. at 312. Conversely, under Mass. Gen. Laws ch. 188, §5, an estate of homestead cannot affect a lien even if it is an avoidable judicial lien. For the reasons set forth in *Whalen-Griffin,* 206 BR. at 291, the Bankruptcy Code must then pre-empt §5. As a result, under §522(f), the Appellants' judicial lien impairs an exemption to which the Appellee would be entitled absent the judicial lien.

/s/_____
William C. Hillman
U.S. Bankruptcy Judge
Dated: January 7, 1998

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed December 23, 1997]

Civil Action No. 97-11470-EFH

PATRIOT PORTFOLIO, ET AL.,)
Appellants)
)
v.)
)
HARRY W. WEINSTEIN,)
Appellee.)

MEMORANDUM AND ORDER OF REMAND

HARRINGTON, D.J.

This is an appeal from a March 25, 1997 Order of the Honorable William C. Hillman, United States Bankruptcy Judge. The Order denied Appellant Patriot Portfolio, LLC's ("Patriot's") Objection to the Homestead Exemption claimed by the Debtor Appellee Harry W. Weinstein ("the Debtor") in his bankruptcy case. The case is properly before this Court pursuant to 11 U.S.C. §158(a)(1).

The primary claim in Patriot's appeal is that the Bankruptcy Court erred in determining that the Massachusetts

Homestead Act was preempted by the Bankruptcy Code in the instant circumstances. In particular, Patriot argues that the Court did not consider the entire Homestead Act (Mass. Gen. L. ch. 188) in making this determination.

Paragraph Three of the Court Order States:

> Whereas, based upon Griffin [In re Griffin, 206 B.R. 277 (Bankr. D.Mass. 1997)], I conclude that once a debtor has filed for relief, the applicable provisions of the Bankruptcy Code pre-empt the exceptions to the Massachusetts homestead exemption.

The exceptions to the homestead exemption, referred to in Judge Hillman's Order, are listed in Section One of the Homestead Act, Mass.Gen.L.ch. 188, §1 (1)-(6). The second exception listed in Section One excludes from a homestead "a[ny] debt contracted prior to the acquisition of said estate of homestead." Mass.Gen.L.ch. 188, § 1(2). The Bankruptcy Court for the District of Massachusetts is split on whether or not this exception is preempted by the Bankruptcy Code. See Griffin *supra;* In Re Fracasso, 210 B.R. 221 (Bankr.D.Mass. 1997); In Re Van Rye, 179 B.R. 375 (Bankr.D.Mass. 1995); In Re Boucher, 203 B.R. 10 (Bankr.D.Mass. 1996).

In this case, Judge Hillman explicitly relied upon the opinion of Judge Feeney in Griffin, in holding that the Bankruptcy Code preempted the statutory exceptions in Section One of the Homestead Act.

Judge Hillman's reliance upon Griffin was well founded. In Griffin, Judge Feeney thoroughly analyzed the interplay between the Bankruptcy Code and the "prior

contracted debt" exception to the Homestead Act and ultimately held that the Bankruptcy Code preempted the "prior contracted debt" exception.

However, the instant dispute is distinguishable from Griffin in one respect. The prior contracted debt in Griffin was unsecured while the debt in this case was secured. This distinction is significant because Section 5 of the Homestead Act provides a secured creditor with an additional protection unavailable to an unsecured creditor. Mass.Gen.L.ch. 188, § 5. Section 5 States, "No estate of homestead shall affect a mortgage, lien, or other encumbrance previously existing." Mass. Gen. L. ch. 188, § 5.

Since the Bankruptcy Court has not explicitly ruled whether secured debts are part of a bankruptcy debtor's homestead and because the Bankruptcy Court for the District of Massachusetts is split on whether unsecured debts are a part of such a homestead, this Court asks the Bankruptcy Court to consider whether a secured creditor should be provided special protection under Section 5, or any other section, of the Massachusetts Homestead Act. Therefore, this Court remands the case to the United States Bankruptcy Court for further consideration.

SO ORDERED.

/s/_____
EDWARD F. HARRINGTON
United States District Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

[Filed March 25, 1997]

Case No. 96-16431-WCH
Chapter 7

IN RE:)
HARRY W. WEINSTEIN,)
Debtor.)

ORDER

WHEREAS, on January 29, 1997, I issued my Decision Regarding Objection to Exemption (the "Decision");[1]

WHEREAS, after having reviewed the recent decision of *In re Griffin,* Case No. 96-11370-JNF (Bankr. D. Mass. March 14,1997), I agree with and adopt Judge Feeney's well-reasoned conclusion;

WHEREAS, based upon *Griffin,* I conclude that once a debtor has filed for relief, the applicable provisions of the

[1] For the purpose of this Order, however, I will adopt the facts set forth in the Decision.

Bankruptcy Code pre-empt the exceptions to the Massachusetts homestead exemption; and

WHEREAS, once the Debtor filed for relief, he was entitled to the full amount of his homestead exemption notwithstanding any debts which arose prior to his Declaration of Homestead:

NOW THEREFORE, it is ORDERED:

(1) The above captioned case shall be re-opened in order to accord relief to the Debtor, 11 U.S.C. §350 (b);

U.S.C. §350(b);

(2) Except as set forth in footnote one above, the Decision is vacated;

(3) Patriot's objection to the Debtor's exemption based upon his homestead is overruled;[2]

(4) The Debtor's request that Patriot's lien be avoided as it impairs the Debtor's exemption pursuant to 11 U.S.C. §522(f) is granted.[3]

---

[2] For the reasons set forth in the Decision, I sustain Patriot's objection to the Debtor's exemption based upon Mass. Gen. Laws ch. 209, § 1.

[3] If the Debtor requires an additional order for recording, he may petition the Court.

/s/_____
William C. Hillman
U.S. Bankruptcy Judge

Dated: March 25, 1997

APPENDIX G

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

[Filed January 29, 1997]

Case No. 96-16431-WCH
Chapter 7

IN RE:)
HARRY W. WEINSTEIN,)
Debtor.)

DECISION REGARDING OBJECTION TO EXEMPTION

I. INTRODUCTION

Patriot Portfolio, LLC. ("Patriot"), filed an Objection to the Exemptions Claimed by the Debtor as to his Residence on the grounds that its lien was exempt from the homestead exemption ("Objection"). Harry W. Weinstein (the "Debtor") filed a response in which he requested that the Court overrule the Objection and avoid Patriot's lien on the grounds that it impaired his exemption. I held a hearing and took the matter under advisement.

II. BACKGROUND

On January 8, 1992, the Debtor and his wife recorded an election to have their tenancy by the entirety treated as a tenancy created pursuant to Mass. Gen. Laws ch. 209, § 1. *See* Mass. Gen. Laws ch. 209, §1A. Approximately three months later, on April 16, 1992, Guaranty First Trust Company ("Guaranty") obtained judgment against the Debtor in Waltham District Court to satisfy a promissory note which the Debtor had executed in favor of Guaranty on October 29, 1986 (the "Judgment"). On July 15, 1992, execution issued on the Judgment. On August 4, 1992, Guaranty caused the execution to be levied on the Debtor's residence (the "Property"). The levy was suspended. On April 2, 1996, the Debtor recorded a declaration of homestead with the Suffolk County Registry of Deeds.

On August 26, 1996 (the "Petition Date"), the Debtor filed for relief under Chapter 7 of the United States Bankruptcy Code (the "Code"). In his schedules, the Debtor claimed his exemptions in accordance with the laws of the Commonwealth of Massachusetts. 11 U.S.C. §522(b). He claimed an exemption in the Property in the amount of $55,000 pursuant to Mass. Gen. Laws ch. 188, §1 and in the amount of $92,500 pursuant to Mass. Gen. Laws ch 209, §1.[1]

---

[1] Section 1 of ch. 188, §1 provides in part:
An estate of homestead to the extent of one hundred thousand dollars in the land and buildings may be acquired pursuant to his chapter by an owner... Said estate shall be exempt from- the laws of payment of debts or legacies except in the following cases:
(1) sale for taxes;

Patriot, as successor-in-interest to the Federal Deposit Insurance Corporation, Liquidating Agent of Guaranty, objects to both of the grounds upon which the Debtor claims an exemption in the Property. First, Patriot argues that the exemption pursuant to Mass. Gen. Laws ch. 188, §1 is faulty because its lien arose prior to the declaration of homestead. Second, Patriot contends that Mass. Gen. Laws ch. 209, §1 does not give the Debtor an exemption in the Property, although it protects the interest of the non-debtor until the tenancy by the entirety terminates.

In his response, the Debtor first offers a general denial of the Objection. The Debtor then argues that he can fully avoid Patriot's lien pursuant to 11 U.S.C. §§522(f)(1)(A) and

---

> (2) for a debt contracted prior to the acquisition cf said estate of homestead;...

Mass.Gen. Laws ch. 188, §1.

> Section 1 of ch. 209, §1 provides in part as follows:
> The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.

Mass. Gen. Laws ch. 209, §1.

(2)(A).[2]

III. ANALYSIS

A. Application of 11 U.S.C. 522(f)

Section §522(f) provides, in part, as follows:

> (f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--
> (A)a judicial lien, other than a judicial lien that secures a debt--...
> (2) (A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of-
> (i) the lien,
> (ii) all other liens on the property; and
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens...

---

[2] Although lien avoidance should be sought by motion, Fed. R. Bankr. P. 4003(d), I will consider the issue to have been properly raised.

11 U.S.C. §522(f).

The Debtor claims that because the value of the Property is $195,000, his one-half interest in the Property is $97,500. Patriot's lien, all other liens and the amount of the Debtor's claimed exemption total $240,606.96. Because these encumbrances exceed the value of the Debtor's interest by $143,106.96, the Debtor argues that under the statute, Patriot's lien impairs his exemption and must be avoided.

Patriot responds that avoidance of its lien would be inappropriate because its lien is not subject to the exemption which the Debtor is claiming. That is, because its lien arose prior to the time that the Debtor declared his estate of homestead, the exemption to which the Debtor is entitled is the equity that remains after deducting the amount of the mortgage, his non-debtor spouse's interest and Patriot's lien from the value of the Property. The Debtor contends that Patriot's argument was overruled by the Supreme Court in *Owen v. Owen*, 500 U.S. 305 (1991).

In *Owen,* a creditor held a judgment lien which had attached to the debtor's property prior to when the property acquired its homestead status. *Id.* at 307. The creditor argued that because the Florida homestead statute excepted from its exemption liens acquired before the declaration of homestead, her lien did not impair an exemption to which the debtor would have been entitled. *Id.* at 309. The Supreme Court held that 11 U.S.C. §522(f) dictates that a lien must be avoided if it impairs an exemption to which a debtor would have been entitled if the lien were avoided, not an exemption to which the debtor *is* entitled. *Id.* at 312.

In response to the creditor's argument that such a ruling is inconsistent with the Code's "opt-out" policy, the Supreme Court held:

> [I]t is not inconsistent to have a policy disfavoring the impingement of certain types of liens upon exemptions, whether federal- or state-created. We have no basis for pronouncing the opt-out policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains.

Id, at 313.

Under the case law in Florida, the only exception to a homestead exemption is a preexisting lien. *Id.* at 307. If the creditor's lien were avoided, the debtor would have been entitled to his homestead exemption. Therefore, the Supreme Court concluded that "Florida's exclusion of certain liens from the scope of its homestead protection does not achieve a similar exclusion from the Bankruptcy Code's lien avoidance provision." *Id.* The Court remanded the case for a determination of whether there was a "fixing of a lien" on the debtor's interest.

Under *Owen*, in order to decide whether Patriot's lien can be avoided, I must determine whether, absent Patriot's lien, the Debtor would be entitled to a homestead exemption. The answer is no. Unlike Florida, the exception to the homestead exemption in Massachusetts refers to "debts" contracted prior to the declaration of homestead instead, not liens. Accordingly, even if I were to avoid the lien, the exception to the homestead exemption would still be applicable because Patriot would continue to hold an

unsecured claim pre-dating the homestead exemption. *See In re Duda,* 182 B.R. 662 (Bankr. D. Conn. 1995)("Because the Act is by its terms inapplicable to unsecured claims that predate its effective date, the unavailability of the exemption does not depend upon the existence of a particular judicial lien"), *aff'd sub nom. Gernat v. Belford,* 192 B.R. 601 (D. Conn.), *aff'd* 98 F.3d 729 (2nd Cir. 1996); *In re Streeper,* 158 B.R. 783 (Bankr. N.D. Iowa 1993)("The homestead is nonexempt from antecedent debt regardless of whether the creditor has reduced the debt to judgment."). Because the Debtor cannot demonstrate that he would otherwise be entitled to his homestead exemption, lien avoidance is inappropriate.

B. The Objection to the Homestead Exemption

At the hearing, I asked the parties to address Judge Queenan's recent decision, *In re Boucher,* 203 B.R. 10 (Bankr. D. Mass. 1996). In *Boucher,* the debtor's equity in his residence was $47,414.47. The trustee argued that the debtor's homestead exemption should be disallowed in an amount equal to the total debt incurred prior to the declaration of homestead. The trustee sought authority to sell the property. The debtor objected on the grounds that the amount of the debt, $7,984.53, was too insignificant to warrant such relief.

Judge Queenan determined that the Debtor's equity was exempt because the Massachusetts exception for pre-homestead debts is not effective once a debtor files for bankruptcy relief. As grounds, Judge Queenan held that:

> [i]n light of the clear command of section 522(c) and the preemptive power of Congress under its

> constitutional authority to establish uniform bankruptcy laws, congressional approval of the use of state exemptions cannot be taken to extend to exemptions that protect debts left unprotected by section 522(c). Yet, Congress obviously wanted a debtor to have exempt property. The result is that the Debtor's election of the state exemption stands, but the state exception for pre-homestead debts does not. Invalidating this exception to the exemption is much like voiding the waiver of a state exemption pursuant to section 522(e), notwithstanding the waiver's validity under state law.

Boucher, 203 B.R. at 13[3]

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[3] Section §522(c) provides:

Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except--

(1)a debt of the kind specified in section 523(a)(1) or 523(a)(5) of this title; or

(2)a debt secured by a lien that is--

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B)a tax lien, notice of which is properly filed; or

(3)a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions

Judge Queenan found further support in the manner in which the Supreme Court resolved the conflicting case law regarding the interpretation of 11 U.S.C. §522(f) in *Owen*. He referred to the passage where the Supreme Court stated that the opt-out policy is not absolute and must be applied with competing statutes. Judge Queenan concluded that "[t]he policy competing with the Massachusetts exception for pre-homestead debts is section 522(c). That subsection makes exempt property liable only for certain nondischargeable debts and unavoided liens. Debts contracted prior to a declaration of homestead are not among these." *Id.* at *4.

11 U.S.C. §522(c), however, does not conflict with the Massachusetts exception for pre-homestead debts in this case because the lien is not avoided under §522(f). 11 U.S.C. §522(c)(2)(A)(i). Therefore, *Boucher* is inapplicable. Because I find no other section which conflicts with the exception to the Massachusetts homestead exemption, I conclude that nothing in *Owen* prevents me from enforcing Mass. Gen. Laws ch. 188, §1 in its entirety.

C. The Debtor's Claim to an Exemption Under Mass. Gen. L. ch. 209, §1

In an unpublished decision, *In re Miroslav Michael Vintoniv,* Case No. 96-12065-WCH, July 30, 1995, I held the following with respect to a the debtor's claim of exemption

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regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

11 U.S.C. §522(c).

under Mass. Gen. Laws ch. 209, §1:

> Thus, under Massachusetts law, a debtor's interest in a property held as a tenancy by the entirety is protected from seizure or execution as long as it remains the principal residence of the non-debtor spouse. Massachusetts law does not protect such a property from attachment. *Peebles v. Minnis,* 402 Mass. 282 (1988). Because under Mass. Gen. L. c. 209, § 1 the Property is not exempt from process, the Debtor cannot exempt from his bankruptcy estate his interest in the Property pursuant to 11 U.S.C. §522(b)(2)(B). For this reason, I will sustain the Trustee's objection to the Debtor's claimed exemption in the Property.
>
> This conclusion is in accord with the cases to which the Debtor cites in support of his exemption. *See In re Sforza,* No. 95-CV-10100-RCL, slip op. (D. Mass. October 13, 1995); *In re Digaudio,* 127 B.R. 713 (Bankr. D. Mass. 1991); and *In re McConchie,* 94 B.R. 245 (Bankr. D. Mass. 1988). What created the Debtor's confusion about his ability to obtain an exemption in the Property is that in these cases, Mass. Gen. L. c. 209, § 1 is referred to as a "limited conditional exemption statute".
>
> What these courts meant by this reference is that while the effect of 11 U.S.C §522(b)(2)(B) and Mass. Gen. L. c. 209, §1 is to deny a debtor an exemption in an interest in a

> property held as a tenancy by the entirety, the reality is that a trustee might not be able to realize a debtor's interest until the death of the non-debtor spouse, a divorce or the sale of the property. *But see* 11 U.S.C. §363(h)(trustee can sell property held as tenancy by the entirety if meets four conditions). If the debtor pre-deceases the non-debtor spouse, the trustee's interest is extinguished.

Based upon the foregoing, the Debtor's claim to an exemption under Mass. Gen. Laws ch. 209, §1 is denied.

IV. Conclusion

There are no grounds upon which Patriot's lien is avoidable. Patriot's objection to the Debtor's exemption based upon Mass. Gen. Laws ch. 188, §1 and ch. 209, §1 are sustained. Because these rulings leave the lien in place, I need not decide how to distribute any equity which is not protected by the homestead exemption. *See e.g. In re Rye,* 179 B.R. 375 (Bankr. D. Mass.1995).[4]

/s/_____
William C. Hillman
U.S. Bankruptcy Judge

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[4] In an unpublished decision, First Circuit Local Rule 36.2(b)(6), the First Circuit affirmed that section of *Rye* which held that a trustee has standing to object to a homestead exemption. *Van Rye v. Murphy,* 96 F.3d 1430 (lst Cir. 1996).

Dated: January 29, 1997

Appearances:

For the Debtor:

Joseph P. Bernando, Esq., Billerica, MA

For Patriot Portfolio, LLC.:

Jeffrey D. Ganz, Esq., Boston, MA

APPENDIX H

UNITED STATES CODE ANNOTATED (1987)
CONSTITUTIONAL AMENDMENT V

U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX I

UNITED STATES CODE ANNOTATED
11 U.S.C. §522 (c) (West Supp. 1998)

Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except--

(1) a debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title;

(2) a debt secured by a lien that is--

(A) (i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

APPENDIX J

UNITED STATES CODE ANNOTATED

11 U.S.C. §522 (f) (West Supp. 1998)

(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(A) a judicial lien, other than a judicial lien that secures a debt-

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt--

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

(B) a nonpossessory, nonpurchase-money security interest in any--

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the

personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2) (A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor--

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property; the debtor may not avoid the fixing of a lien on an

interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $5,000.

APPENDIX K

ANNOTATED LAWS OF MASSACHUSETTS

Mass. Ann. Laws ch. 188, @ 1 (1998)

An estate of homestead to the extent of one hundred thousand dollars in the land and buildings may be acquired pursuant to this chapter by an owner or owners of a home or one or all who rightfully possess the premise by lease or otherwise and who occupy or intend to occupy said home as a principal residence. Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies except in the following cases:

(1) sale for taxes;

(2) for a debt contracted prior to the acquisition of said estate of homestead;

(3) for a debt contracted for the purchase of said home;

(4) upon an execution issued from the probate court to enforce its judgment that a spouse pay a certain amount weekly or otherwise for the support of a spouse or minor children;

(5) where buildings on land not owned by the owner of a homestead estate are attached, levied upon or sold for the ground rent of the lot whereon they stand;

(6) upon an execution issued from a court of competent jurisdiction to enforce its judgment based upon fraud, mistake, duress, undue influence or lack of capacity.

For the purposes of this chapter, an owner of a home shall include a sole owner, joint tenant, tenant by the entirety or tenant in common; provided, that only one owner may acquire an estate of homestead in any such home for the benefit of his family; and provided further, that an estate of homestead may be acquired on only one principal residence for the benefit of a family. For the purposes of this chapter, the word "family" shall include either a parent and child or children, a husband and wife and their children, if any, or a sole owner.

APPENDIX L

ANNOTATED LAWS OF MASSACHUSETTS

Mass. Ann. Laws ch. 188, @ 2 (1998)

To acquire an estate of homestead in real property, the fact that it is designed to be held as such shall be set forth in the deed of conveyance by which the property is acquired; or, after the title has been acquired, such design may be declared by a writing duly signed, sealed and acknowledged and recorded in the registry of deeds for the county or district in which the property is situated. To acquire a claim of homestead in a manufactured home, the fact that it is designed to be held as such shall be set forth in a writing duly signed, sealed and acknowledged and filed at the city or town clerk's office in the city or town in which the manufactured home is located. The acquisition of a new estate or claim of homestead shall defeat and discharge any such previous estate.

APPENDIX M

ANNOTATED LAWS OF MASSACHUSETTS

Mass. Ann. Laws ch. 188, @ 5 (1998)

No estate of homestead shall affect a mortgage, lien or other encumbrance previously existing.